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No. 02-946

In The
Supreme Court of the United States

BOARD OF EDUCATION OF THE PAWLING CENTRAL SCHOOL DISTRICT,

Petitioner,

v.

STEVEN SCHUTZ, YVONNE SCHUTZ and STATE EDUCATION DEPARTMENT OF THE STATE OF NEW YORK, FRANK MUNOZ, as the State Review Officer of the State Education Department of the State of New York,

Respondents.

On Petition For A Writ Of *Certiorari* To The United States Court Of Appeals For The Second Circuit

MOTION AND BRIEF *AMICI CURIAE* OF THE NEW YORK STATE SCHOOL BOARDS ASSOCIATION AND THE NEW YORK STATE COUNCIL OF SCHOOL SUPERINTENDENTS IN SUPPORT OF THE PETITION FOR WRIT OF *CERTIORARI*

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MOTION OF THE NEW YORK STATE SCHOOL BOARDS ASSOCIATION AND THE NEW YORK STATE COUNCIL OF SCHOOL SUPERINTENDENTS FOR LEAVE TO FILE A BRIEF *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF *CERTIORARI*

The New York State School Boards Association (NYSSBA) and the New York State Council of School Superintendents (NYSCOSS) respectfully move this Court to grant them leave to file the attached brief as *amici curiae* in the above captioned case. The Petitioner has consented to NYSSBA's and NYSCOSS's participation in this matter. A letter attesting to their consent has been submitted to this Court.

NYSSBA is a not-for-profit membership organization incorporated under the laws of the State of New York, located at 24 Century Hill Drive, Suite 200, Latham, New York. Pursuant to New York's Education Law, NYSSBA has a statutory responsibility to devise "practical ways and means for obtaining greater economy and efficiency in the administration of school district affairs and projects" on behalf of public school districts of the State of New York. (N.Y. Education Law §1618). NYSSBA represents approximately six hundred ninety-five (695) of seven hundred and forty-two (742) public school districts in New York State, or approximately ninety-four percent (94%) of all New York public school districts.

NYSSBA has a longstanding interest in educational policy affecting the administration and operation of public schools and has appeared as an *amicus curiae* before this Court on these issues, including *Good News Club v. Milford Central School Dist.*, 533 U.S. 98 (2001); *Mitchell v. Helms*, 530 U.S. 793 (2000); *Lamb's Chapel v. Center*

Moriches School Dist., 508 U.S. 384 (1993). NYSSBA also was one of the original plaintiffs in *Board of Educ. of the Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687 (1994)), and it represented the petitioners before this Court in *Board of Education of the Enlarged City School Dist. of the City of Watervliet v. Russman*, 521 U.S. 114 (1997).

NYSCOSS is a not-for-profit statewide professional association incorporated under the laws of the State of New York and located at 7 Elk Street, Albany, New York. NYSCOSS represents over 750 of the state's 775 chief school officers. These superintendents are charged with the responsibility of administering the educational program of the state's schools. As their representative, NYSCOSS takes a particular interest in those legal matters where a potential outcome could seriously erode our members' capacity to deliver that service. The matters to be decided in this case could create broad new precedents in special education and therefore are of interest to our members.

This case has a direct bearing on the conditions school districts in New York and across this nation must comply with regarding the delivery of educational services to students with disabilities and the receipt of federal financial assistance under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400 *et seq.*, and its accompanying regulations. Therefore, NYSSBA and NYSCOSS respectfully request the opportunity to advise

this Court more fully on the urgency of granting the Petition for Writ of *Certiorari*.

Respectfully submitted,

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF THE *AMICI* 1

REASONS FOR GRANTING THE WRIT 2

ARGUMENT 3

I. The Second Circuit's ruling allows for a relief not authorized by the Individuals with Disabilities Education Act or this Court's rulings interpreting the statute 3

II. The Second Circuit's ruling contravenes student placement standards imposed by the Individuals with Disabilities Education Act and elucidated upon by this Court in its *Florence County School Dist. Four v. Carter* decision 6

III. The Second Circuit's decision imposes an onerous financial burden on school districts not contemplated by the Individuals with Disabilities Education Act 9

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES:

Board of Education v. Rowley, 458 U.S. 176 (1982) 3

Board of Education of the Pawling Central School Dist. v. Schutz, 290 F.3d 476 (2002) 7, 9

Burlington v. Department of Education of the Commonwealth of Massachusetts, 471 U.S. 359 (1985) 4, 6

Florence County School Dist. Four v. Carter, 510 U.S. 7 (1993) 4, 7, 8

STATUTES:

20 U.S.C. §1400 *et seq.* 2

20 U.S.C. §1411 3

20 U.S.C. §1412(a)(1) 3

20 U.S.C. §1412(a)(5)(A) 3

20 U.S.C. §1412(a)(10)(C)(i) 4

20 U.S.C. §1412(a)(10)(C)(ii) 4

20 U.S.C. §1412(a)(11)(A) 7

20 U.S.C. §1415(b)(6) 3

20 U.S.C. §1415(c)(2) 3

20 U.S.C. §1415(e) 3

20 U.S.C. §1415(f) 3

20 U.S.C. §1415(g) 3

20 U.S.C. §1415(i) 3

TABLE OF AUTHORITIES – Continued

Page

20 U.S.C. §1415(i)(2)(B) 4

20 U.S.C. §1415(j) 6

REGULATIONS:

34 C.F.R. §300.403(c) 4

34 C.F.R. §300.514 6

BRIEF *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF *CERTIORARI*

The Petitioner and the New York State Attorney General have consented to the filing of this brief.[1] Their letter of consent is on file with the Clerk of this Court.

INTEREST OF THE *AMICI*

NYSSBA is a not-for-profit membership organization incorporated under the laws of the State of New York, located at 24 Century Hill Drive, Suite 200, Latham, New York. Pursuant to New York's Education Law, NYSSBA has a statutory responsibility to devise "practical ways and means for obtaining greater economy and efficiency in the administration of school district affairs and projects" on behalf of public school districts of the State of New York. (N.Y. Education Law §1618). NYSSBA represents approximately six hundred ninety-five (695) of seven hundred and forty-two (742) public school districts in New York State, or approximately ninety-four percent (94%) of all New York public school districts. NYSSBA has a long-standing interest in educational policy affecting the administration and operation of public schools, including issues related to the education of students with disabilities.

NYSCOSS is a not-for-profit statewide professional association incorporated under the laws of the State of New York and located at 7 Elk Street, Albany, New York.

[1] This brief was written entirely by counsel for the *amici curiae* and not in any part by counsel for either party. No person or entity other than the *amici* has made a monetary contribution to the preparation or submission of this brief.

NYSCOSS represents over 750 of the state's 775 chief school officers. These superintendents are charged with the responsibility of administering the educational program of the state's schools, and NYSCOSS takes particular interest in those legal matters where a potential outcome could seriously erode our members' capacity to deliver that service.

School districts throughout New York and across this nation receive or are eligible to receive federal financial assistance under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400 *et seq.* In exchange for such aid, they must comply with certain specified conditions set forth in the statute and its accompanying regulations. Those at issue in this case affect the responsibility of school districts toward students with disabilities unilaterally placed by their parents in private schools, and as such are of great importance to school districts across New York, as well as school districts across this country.

REASONS FOR GRANTING THE WRIT

I. The Second Circuit's ruling allows for a relief not authorized by the Individuals with Disabilities Education Act or this Court's rulings interpreting the statute.

II. The Second Circuit's ruling contravenes student placement standards imposed by the Individuals with Disabilities Education Act and elucidated upon by this Court in its *Florence County School Dist. Four v. Carter* decision.

III. The Second Circuit's decision imposes an onerous financial burden on school districts not contemplated by the Individuals with Disabilities Education Act.

ARGUMENT

The Second Circuit misinterpreted the Individuals with Disabilities Education Act (IDEA) and this Court's prior rulings interpreting the statute to rule that a school district is financially responsible for maintaining a student at a private non-approved school unilaterally selected by his or her parents while court proceedings are ongoing regarding the alleged failure of the district to provide the student with a free appropriate public education. If this ruling is allowed to stand, it will impose on school districts an obligation not contemplated by the statute or this Court's prior rulings. It will also require school districts to act in direct contravention of their statutory responsibilities and impose an onerous burden on school districts.

I. The Second Circuit's ruling allows for a relief not authorized by the Individuals with Disabilities Education Act or this Court's rulings interpreting the statute.

The IDEA requires that states and local educational agencies receiving financial assistance under the statute provide eligible children with disabilities a "free appropriate public education" in the least restrictive environment appropriate to meet a child's individual educational needs. (20 U.S.C. §§1411; 1412(a)(1), (5)(A); *Board of Education v. Rowley*, 458 U.S. 176, 181 (1982)). It also allows parents to present complaints regarding, *inter alia*, the educational placement of their child or provision of a free appropriate public education to their child, as well as to obtain relief to rectify the denial of a free appropriate public education. (20 U.S.C. §1415(b)(6); (c)(2); (e); (f); (g); (i)). Accordingly, the statute authorizes a court to grant parents any such relief it determines to be appropriate, basing its decision

on the preponderance of the evidence before it. (20 U.S.C. §1415(i)(2)(B)).

Consistent with this statutory scheme, this Court has allowed parents who place their child in a private school because they disagree with a school district's proposed educational program for their child to seek reimbursement of the tuition costs associated with such placement. However, such relief may be granted only upon a final finding that a school district has failed to make a free appropriate public education available to the child and the parent's private placement is appropriate. (20 U.S.C. §1412(a)(10)(C)(ii)); 34 C.F.R. §300.403(c); *Burlington v. Department of Education of the Commonwealth of Massachusetts*, 471 U.S. 359 (1985); *Florence County School Dist. Four v. Carter*, 510 U.S. 7 (1993)).

According to this Court, an award of retroactive reimbursement is appropriate because it provides for the payment, albeit belatedly, of expenses a school district "should have paid all along and would have borne in the first instance had it developed a proper IEP." (471 U.S. at 370-71). Thus, it is clear that parents of eligible children with disabilities are not entitled to an award for the cost of a student's education at a private school or facility of their choice if the school district their child attends makes available a free appropriate public education to the child, notwithstanding the parents' disagreement with the district's offer. A school district incurs liability for such cost only upon a final determination that it has indeed failed to make available a free appropriate public education to the child. (20 U.S.C. §1412(a)(10)(C)(i)).

By comparison, the Second Circuit's ruling requires that a school district pay "up front" a student's tuition at a

private school selected by the parents. This would be the case, even when a district chooses to challenge in court a state administrative finding that it has failed to make available a free appropriate public education and that the parents' private placement is appropriate and, therefore, a final resolution regarding the district's alleged failure to provide a free appropriate public education is still pending.

Even more of a problem, the same outcome would occur when, as in the present case, a parent is successful in obtaining retroactive reimbursement for a given school year and then chooses to contest a district's proposal for the following year. The district would have to pay up front tuition during the pendency of proceedings regarding the second challenge, and into subsequent years while the proceedings are ongoing even when the district makes a new offer for a free appropriate public education which the parents never contest during the pendency of those proceedings.

Thus, under the Second Circuit's ruling a district becomes liable for something other than retroactive reimbursement and the parents obtain relief even when a final determination regarding the merits of their complaint is still pending. Consequently, the Second Circuit's decision expands a parent's right to a private school tuition award beyond the clear statutory language and the scope of that right as established by this Court's prior rulings.

II. The Second Circuit's ruling contravenes student placement standards imposed by the Individuals with Disabilities Education Act and elucidated upon by this Court in its *Florence County School Dist. Four v. Carter* decision.

The IDEA confers upon eligible children with disabilities "stay-put" rights which require that "unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then current educational placement . . . until all such proceedings have been completed." (20 U.S.C. §1415(j)).

Neither the IDEA nor its implementing regulations define the term "current educational placement." However, throughout time, the term has come to be understood as referring to the last agreed upon placement between parents and a school district, as determined by the individualized educational program in place when stay-put protection is invoked. (*See, Burlington*, 471 U.S. at 371-72).

Regulations issued by the U.S. Department of Education in 1999 to implement the IDEA provide that:

> If the decision of a hearing officer in a due process hearing conducted by the SEA [state educational agency] or a state review official in an administrative appeal agrees with the child's parents that a change of placement is appropriate, that placement must be treated as an agreement between the State or local agency and the parents for purposes of [determining a child's current educational placement]. (34 C.F.R. §300.514).

The Second Circuit expanded the regulatory language by ruling that a prior state administrative "order for reimbursement predicated on a finding that a proposed IEP [individualized education plan] is inappropriate for a child constitutes a change in the child's placement for purposes of interpreting the pendent placement provision at §1415(j) of the IDEA." (*Board of Education of the Pawling Central School Dist. v. Schutz*, 290 F.3d 476, 484 (2002)).

Regarding the Second Circuit's ruling, the *amici* submit that an order for reimbursement cannot be deemed to constitute a determination that a change in placement is appropriate. This is because all that is required for a reimbursement order is a finding that a district has failed to make available a free appropriate public education and that a parents' placement is appropriate. A school district may be found to have failed to provide a free appropriate public education merely because of procedural technicalities in the development of an IEP that have no actual bearing on the appropriateness of a district's proposed placement for a child with disabilities.

The *amici* further submit that both the regulatory language cited above and the Second Circuit's ruling run afoul of statutory student placement requirements. As acknowledged by this Court, the IDEA requires that State educational agencies ensure "all educational programs for children with disabilities . . . administered by any other State or local agency . . . meet the educational standards of the State educational agency." (20 U.S.C. §1412(a)(11)(A); *see, Florence County*, 510 U.S. at 13-14). Thus, states and school districts are prohibited by statute from agreeing to the placement of a child in a school that does not meet state educational standards and is not approved by a state as a school for children with disabilities.

The school at issue in this case, does not meet state educational standards and has not been approved by the State of New York as a school for children with disabilities. Therefore, the State and the school district are prohibited by statute from agreeing to the placement of a student with disabilities there. Accordingly, the Second Circuit's ruling ordering the school district to maintain the child at the non-approved school selected by the parents contravenes the statutory placement requirements applicable to public agencies.

This conclusion is not inconsistent with this Court's ruling in *Florence County*. There, this Court upheld the right of parents to recover the cost of private school tuition even when the school they might select is not state-approved. But it did so based on a determination that the IDEA requirements that a "school meet the standards of the state educational agency" do not apply to private parental placements". (510 U.S. at 13-14).

In the case herein the regulation set forth above and the Second Circuit's determination that a prior order of reimbursement constitutes a change of placement for purposes of determining a child's pendency placement transform the parents' private placement into a public agency placement by virtue of the state's or local educational agency's implied agreement to such placement. In accordance with clear regulatory language and this Court's ruling in *Florence County*, any placement agreed to by the state or local educational agency must comply with state educational standards. Therefore, the Second Circuit's ruling contravenes the IDEA and this Court's decisional law.

III. The Second Circuit's decision imposes an onerous financial burden on school districts not contemplated by the Individuals with Disabilities Education Act.

In essence, the regulation at issue in this case, and the Second Circuit's decision convert a unilateral parental private placement into a public agency placement by virtue of a State administrative ruling in favor of parents challenging a school district's proposed educational program for their child. According to the Second Circuit, a child remains in such placement, and a school district remains financially responsible for maintaining the child there, "'until a new placement is established by either an actual agreement between the parents and the District, or by an administrative decision upholding the District's proposed placement which [the parents] choose not to appeal, or by a court . . . '" (*Board of Education of the Pawling Central School Dist.*, 290 F.3d at 484).

Consequently, for example, if to avoid the costs of continued litigation, a school district chooses not to appeal the State administrative decision to a federal or state court, and the parents reject a subsequent school district proposal for their child's educational placement, the process starts all over again, with the added dimension that even if a new IEP is upheld at a state administrative proceeding, the child remains at the private school as the current educational placement if the parents appeal that decision. As a result school districts would have to pay for the cost of private school tuition even when it has made a valid offer of an appropriate public education.

Such an outcome imposes an onerous financial burden on school districts not contemplated by the IDEA, and one they can ill afford given the tremendous costs of special

education. Although it is difficult even to estimate the additional expense that school districts would have to incur to pay for private school tuition up front while awaiting final resolution as to whether they indeed have failed to provide a free appropriate public education, such costs would be substantial by any measure, particularly in New York where the vast majority of reimbursement cases involve private non-approved schools.

The IDEA mandates that school districts offer eligible students with disabilities a free appropriate public education. It is inconsistent with the statute to award parents relief and to impose a substantial financial burden on school districts while there are ongoing proceedings, and no final resolution, regarding their compliance with that mandate.

CONCLUSION

For the reasons stated above, the *Amici* respectfully request that this Court grant the Petition for Writ of *Certiorari*.

Respectfully submitted,

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